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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. 339

DANNY ROY SHOEMAKER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. B. TIETZ
410 Douglas Building
257 South Spring Street
Los Angeles, California 90012
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-8080

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To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The final judgment of the Court of Appeals was entered on June 12, 1969, denial of petition for rehearing. See Appendix B to this petition. This petition for Writ of Certiorari is filed within the required thirty days' time.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTION PRESENTED

The sole question presented is:

Whether a I-O type Selective Service System registrant is entitled to the same physical inspection as are other selectees ordered for induction.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the First Amendment and § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.). They are set forth in Appendix C. The agency regulations involved are set forth in the Argument.

5. STATEMENT OF THE CASE

The indictment charged petitioner with a violation of the Universal Military Training and Service Act, 50 U.S.C.

App. § 462 (Tr. 2]*; that he became a registrant of Local Board No. 136 of the Selective Service System, State of California and that having theretofore been duly classified in Class I-O, did knowingly refuse and fail to comply with the order of his said Local Board No. 136 to report for and accept the assigned civilian work. [Tr. 1]

Petitioner pleaded not guilty, waived jury trial and was tried on April 8, 1968. [Tr. 25] A written motion for judgment of acquittal was filed, [Tr. 22] The motion was denied and the petitioner was found guilty on April 8, 1968, and thereafter was sentenced and admitted to bail pending appeal. [Tr. 26]

6. THE FACTS

The relevant facts in this appeal are found in (1) the defendants' Selective Service file [Ex. 1-65]* and in (2) the reporter's transcript of the trial [RT 1-25]** both being parts of the designated record on appeal. [Tr. 27]

1. The File.

Defendant showed, at his earliest opportunity (Sept. 24, 1965 in his Classification Questionnaire, Ex. 7) that he was "a formally ordained minister of the Jehovah's witnesses since August 26, 1955."

He amplified his few words, that the space in the form physically permitted, by a page of description. [Ex. 9]

Later, when he was sent the Special Form for Conscientious Objector he gave additional evidence:

*Ex. refers to the government Exhibit #1, the complete SS file of appellant.

**RT refers to the reporter's transcript.

(a) He answered the question: "6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions. My ministerial activity, going from door to door making block calls on people holding bible studies and various activities in the ministry." [Ex. 14]

(b) He pointed out that his mother and father were both Jehovah's witnesses. [Ex. 16]

(c) He gave details concerning the parent organization and the congregation of ministers he worked with and from.

Subsequently, he had an Appearance Before Local Board on April 7, 1966. There he informed them [Ex. 25, the local board's version]:

(a) He was considered a minister.

(b) He talked "to people door to door" giving approximately 10 hours per week to this religion.

(c) The clerk filed an account of what was said at this meeting giving the above. He was not told to summarize *his* views of this meeting for a filing in the board's records; although he was advised by the board of other things.

Although the local board had classified him I-A the appeal board classified him in Class I-O. [Ex. 27]

He was thereafter processed for civilian work. [starting Ex. 38]

His reply on the Special Report for Class I-O Registrants, to the question: Describe training, experience, and degree of proficiency in the skills in which you are most interested. "Ministry; I've been a minister since September 28, 1958." [Ex. 40]

His reply was considered "incomplete" and he was eventually ordered to come to an "arbitration" meeting with the local board and a representative of the State Director. [Ex. 46]

The clerk's resume of it is on page 47 of the Exhibit and the second paragraph says: "Selective Service does not deny that you are a minister in the eyes of your church; however, you are not eligible for a IV-D classification as a minister under the Selective Service Regulations because you have not, to date, satisfied your local board that you are teaching and preaching the principles of your church as your vocation. Registrant understood this." [Ex. 47] Another paragraph: "A board member asked subject if he felt he had had a fair hearing and if there was any further information he wished to add. Subject replied his intentions were to enter into the ministry and before he becomes a Pioneer he must meet certain requirements. He feels next month he will have more time to devote to his work. He was advised when he does complete the requirements for a Pioneer to be sure to present evidence to the local board." [Ex. 47]

Due to not having "reached the age group of subject registrant" [Ex. 57] he was not to report for induction until August 8, 1967. [Ex. 61]

He refused to report and was eventually indicted.

2. The oral testimony.

Defendant testified that he had "dedicated my life to the serving of my God" [RT 11/9] and that "I let nothing interfere with the activity in which I must do," [RT 11/14] and that, as an instance, "Well, in September of last year I quit a job which I did have so that I could spend more time in the meeting" [RT 11/20]. Also, as another in-

stance (answering a question from the bench) that he is now self-employed. [RT 17/22]

An objection to further explanatory testimony was made and sustained and defendant made offers of proof, as follows:

"If permitted to testify he would testify that the punishment for a compromise is everlasting death". [RT 12/9]

"If permitted to testify the witness would testify that that means that Jehovah has given those in the truth, the true believers, a promise of everlasting life. In other words, that millions now living would never die." [RT 12/17]

"If he were permitted to answer he would testify that he put in in this non-reportable work other ministerial work amounting to 60 hours a month, such as preparation for his backhall [back calls], study sessions, attending joint services with the other ministers on Sundays." [RT 13/9]

"If permitted to testify the defendant would testify that in addition to belonging to a congregation of ministers he, like all the witnesses, was assigned a congregational [geographical] area, solely his own congregation, and in that area he had the exclusive duty to perform." [RT 13/24 - 14/4]

"If permitted to testify he would testify that his medical history includes the following:

Two ear operations, a broken arm, a hernia, that he is allergic to metal, like wearing a chain around his neck, he reacts to it and he is allergic to detergents." [RT 15/1]

"If permitted to testify, the witness would say it is because his commitment is to be a minister, to serve Jehovah, and to be called away from his meetings or

these other commitments, backhalls [back calls] and all, would be a violation of his religious belief." [RT 17/6]

7. REASONS FOR GRANTING WRIT

The sole question raised by the petition call for a definitive answer to the oft-raised question:

Is there sufficient reason for the practice of this administrative agency to order final physical inspections to its I-A and I-A-O registrants and to not order this given to its I-O registrants?

The question is of national import because several thousand registrants have been, are, and will be in the predicament of petitioner: they are not given fair and equal treatment.

8. ARGUMENT

I

Appellant's Unrebutted Prima Facie Case

Appellant sufficiently showed the local board [Ex. 9], and attempted to clarify and further show in court, that he had worked at various secular activity only to earn a living [RT 9-14]; that his life's work was to be a minister and that he looked forward to the time when he could engage in full time ministry work by getting in a self employment field of work to support himself and thus engage in ministry "full time", that is, putting in enough "field" hours to earn the hierarchy status of "pioneer minister". [RT 9-14]

Although the board rejected his ministerial claim we urge that he had presented a prima facie case for a IV-D classification (minister's status). No contrary evidence,

if any existed, was ever placed in the file. *Dickinson* v. *United States,* 74 S. Ct. 152 (1953), supports our conclusion.

II

Failure of Proof: No Final Physical

The record is clear. The provision for a final physical inspection was not followed, nor was there an equivalent. Sheet No. 33 of the Government Exhibit, the Selective Service file demonstrates that this was not done.

The applicable law requires "equal" treatment to all registrants. The act uses the expression "a system of selection which is fair and just" [§ 1 (c)]. The regulations, on our specific subject, are explicit, as we shall point out.

If the law had failed to specify a physical examination for I-O registrants, giving no reason, there concededly would be an implication that the omission was because it was believed that I-O registrants would be subject to different stresses in civilian work than I-A and I-A-O registrants in the armed services; also, if the law had specified a different type of examination for I-O registrants, we would then have a clear indication of legislative or administrative intent to make a distinction in processing.

But where, as here, we have the identical examination specifically required of Class I-A, Class I-A-O and Class I-O registrants (§ 1623.3, C.F.R.) and where, as here, the defendant has already been given one of these identical armed forces type examinations we have left only the questions of its validity as affected by expiration of time or by the required final "inspection."

The governing regulations are both civilian and military.

Section 1622.1, subsection (b), specified that all registrants are to be processed in the "spirit" of the Act of Congress, namely, equality of privileges. Subsection (d) specifies that none is to be discriminated against because he belongs to a particular class. This certainly covers conscientious objectors. The Act requires that all be done "in accordance with a system of selection which is fair and just." (§ 1 (c)).

Then, with respect to physical examination the procedures set forth are spelled out and *no* distinction is made between registrants ordered to report for civilian work (Class I-O) and registrants ordered to report for induction (Class I-A-O and Class I-A). Subsection 1623.3 says:

"PHYSICAL EXAMINATION

"Physical examination of registrants classified in Class I-A, Class I-A-O, or Class I-O shall be accomplished under the provisions of part 1628, of this chapter."

Next, we see Subsection 1628.10. It has two significant words: "every" with respect to registrants, thus showing that it was intended that every registrant was to be examined, as provided; and "shall" was used, making the procedure mandatory.

"ARMED FORCES PHYSICAL EXAMINATION.

"1628.10 Who Will Be Examined -

Every registrant, before he is ordered to report for induction, or *ordered to perform civilian work* contributing to the maintenance of the national health, safety, or interest, *shall* be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination." (Emphasis supplied.)

Since appellant is neither a delinquent nor a volunteer, there can be no question but that Section 1628.10 applied to him.

Finally, § 1660.20 (a) shows specifically that I-O registrants are to be treated like and processed like the I-A registrants, with respect to terminal processing after the physical examination.

> "1660.20 DETERMINATION of Type Civilian Work to Be Performed and Order by the Local Board to Perform Such Work -
>
> (a) When a registrant in Class I-O is found acceptable for service after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after notice of acceptability is mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. If the local board deems any one of these types of work to be appropriate, it will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work."

Fairness requires equality in the regulations. Even-handed administration of the law by this agency should be its practice, as well as its written procedures. Let us examine the written procedures further. With respect to Order of Call the intent of the top level of the agency is that even-handed procedures be followed. First, note the statement in the 1959 Annual Report, at page 25:

"Both the I-O's and I-A-O's are subject to the same sequence of induction as the I-A's and the regulations concerning extension of liability and the induction of fathers applies equally to them."

The year earlier the 1958 Report, at page 24 phrases it:

"The same sequence for forwarding I-A's for induction applies to the I-O's."

Then, to finalize this top-level, generalized interpretation consider the explicit statement and specific application in the Director's letter of November 28, 1960:

"Reexamination of registrants . . . applies to registrants who are classified in Class I-O"

The form of pre-induction physical examination (Report of Medical Examination Standard Form 88 Bureau of the Budget) contains a stamp for later use, in the following form:

"Physical Inspection, Date. . . . . .

AFEES, LOS ANGELES, CALIFORNIA

No additional defects discovered.

(Fit) (Unfit) for military service."

This form appears at page 33 of the Government's Exhibit. The above-mentioned stamp is not dated and neither the word "fit" nor the word "unfit" has been struck out. Ordinarily, this item subsequently is dated and initialed by the examining physician, and one of those words is lined out. See *Briggs* v. *United States*, 9 Cir., 1968, 397 F.2d 370.

We submit *Briggs* applies.

CONCLUSION

For the reasons given certiorari should be granted and the judgment should be reversed.

Respectfully,

J. B. TIETZ
410 Douglas Building
257 South Spring Street
Los Angeles, California 90012
Attorney for Petitioner

July 12, 1969.